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Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1971

Docket No. 35591

HERBERT GREENBERG,

Petitioner,

- against -

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1971

Docket No. 35591

HERBERT GREENBERG,

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- against -

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Herbert Greenberg petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 16, 1971 (Docket No. 35591).

The judgment affirmed the conviction for giving money to a public official in violation of 18 U.S.C. 201 (f).

Opinion Below

The opinion of the Court of Appeals, not yet reported, is set forth in the appendix.

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is granted pursuant to 28 U.S.C. 1254(1).

Constitutional Provisions Involved

The Sixth Amendment Right to a jury trial and the Fifth Amendment Right to due process of law in a criminal trial are involved.

Issues Involved

Should this Court resolve the conflict between the First Circuit in Kadis (373 F.2d 370) and the Second Circuit in this case, as to when the issue of entrapment in a criminal trial should be submitted to the jury?

Did the Court of Appeals err, contrary to constitutional rights to a jury trial and due process, in holding that the district judge, in a criminal jury trial, may find as a matter of fact that the prosecution established the disposition of the defendant to commit the offense, and that the district judge need not submit the issue of entrapment to the jury?

Did the Court of Appeals err, contrary to the constitutional right to a jury trial and due process, in holding that the prosecution in a criminal jury trial, in which all agree the government has the burden of proof as to the issue of predisposition of the defendant to commit the offense, as against the defense of entrapment, may meet that burden of proof, by satisfying the trial judge that it has offered "uncontradicted" evidence, and that the

prosecution is not required to persuade the jury on that issue?

Preliminary Statement

Greenberg, an Internal Revenue agent, was convicted of giving $200 to Harold Wenig, an agent with the Inspection Service branch of the Internal Revenue Service, who was conducting an undercover investigation into alleged corrupt practices by field audit agents. Wenig pretended to be double dealing, and informed Greenberg's friend (Brover) that he was willing to sell information as to the investigation. Brover arranged a meeting between Greenberg and Wenig. At the meeting Wenig told Greenberg of the progress of the investigation of one of Greenberg's audits. Greenberg asked Wenig to keep him posted on developments in the investigation and gave him $200.

Greenberg did not testify.

Through cross-examination of Wenig by his counsel, Greenberg contended that the government had entrapped him into giving the money to Wenig.

The trial court refused to submit the issue of entrapment to the jury because of lack of evidence.

The Court of Appeals, while conceding that the defense had introduced sufficient evidence of inducement by the government undercover agent, to meet its burden of proof on that score, held that the defense did not satisfactorily contradict the government evidence on the issue of predisposition, and thus the question of entrapment could not be submitted to the jury.

The Court of Appeals wrote:

> This circuit adheres to the bifurcated analysis of entrapment defined in United States v. Sherman, 200 F.2d 880, 882-883 (2 Cir. 1952) (L. Hand).[1] In Sherman we sought to explain the early Supreme Court decision in Sorrells v. United States, 287 U.S. 435 (1932), and concluded that the defense of entrapment presents two separate factual issues for resolution:
>
> > (1) [D]id the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it.
>
> We have heretofore ruled that inducement refers to the Government's initiation of the crime apart from the degree of pressure exerted upon the defendant to commit the crime; and that the defendants' burden is, "relatively slight" to substantiate an inducement. United States v. Henry, 417 F.2d 267, 269 (2 Cir. 1969), cert. denied, 397 U.S. 953 (1970). Here it is conceded that sufficient evidence of inducement was supplied.
>
> We now discuss the second, the predisposition, issue. In United States v. Riley,

1. This approach has been rejected by the First Circuit in Kadis v. United States, 373 F.2d 370 (1 Cir. 1967). We have not been asked to reconsider Sherman in the light of Kadis.

363 F.2d 955, 959 (2 Cir. 1966), we considered the proof required of the Government to satisfy its burden on this issue so as to preclude submission of the entrapment defense to the jury, and we held that entrapment is not a jury question "if uncontradicted proof has established that the accused" had the requisite propensity. Nevertheless, "the production of any evidence negating propensity, whether in cross-examination or otherwise, requires submission to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be."[2]

As required by Riley, here the district court found as the basis for not submitting the entrapment issue to the jury that "the government's evidence shows uncontradicted evidence of readiness and willingness."

Greenberg argues that the requirement in Riley that the proof of propensity be uncontradicted means that that proof must be both "uncontradicted" and "beyond a reasonable doubt," that the Government failed to meet this standard, and that the Government's own evidence of government inducement was sufficient to require that the jury decide whether he was entrapped. We agree with appellant that the Government must introduce more than a "scintilla" of evidence on predisposi-

2. The court in Riley thought that its holding reconciled those cases which affirmed convictions "on the ground that submission was not required even though the evidence showed Government initiation" with other cases "condemning a failure to put the issue to the jury although the evidence on propensity strongly favored the prosecution." 363 F.2d at 959.

tion. But here the Government went far beyond this. Its evidence showed that Greenberg grasped at the opportunity, and this was not challenged either by contradiction or by impeachment of the Government witnesses. As recognized in Riley the defense of entrapment is primarily the implementation of a policy that crimes committed at the behest of government agents involve special considerations, but that the defense does not negative any of the essential elements of the crime. Thus, when the Government offers substantial evidence of propensity and this is in no way challenged, there is no occasion to submit the issue of entrapment to the jury.[3]

Appellant contends that, even though he did not contradict the Government's evidence, the prosecution's own case was internally inconsistent and so the Government itself failed to build a substantial enough case to withdraw entrapment issues from the jury. However, we are satisfied from a careful reading of the transcript that the Government clearly demonstrated Greenberg's predisposition, and, as Greenberg offered no contradictory evidence, we subscribe to the district court's conclusions,[4] and affirm his

3. Of course it is to be noted that, if contradictory evidence is introduced, the question of predisposition becomes an issue for the jury with the normal burden of proof beyond a reasonable doubt.

4. We are also asked to hold that the "permissible limits" of inducement were exceeded by the agent because "the fear of unwarranted investigation" by the government exerted an undue and improper pressure upon the defendant. Cf. United States v. Morrison, 348 F.2d 1003 (2 Cir.), cert. denied, 382 U.S. 905 (1965). The evidence, however, discloses that Greenberg was not an innocent citizen unjustly misled.

conviction.

Reasons for Granting the Writ

The opinion of the Second Circuit in this case is at variance with the opinion of the First Circuit in Kadis v. United States, 373 F.2d 370 (1967). Even footnote 1 to the opinion in our case recognizes the conflict—

> "This approach has been rejected by the First Circuit in Kadis v. United States, 373 F.2d 370 (1 Cir. 1967). We have not been asked to reconsider Sherman in the light of Kadis."

In footnote 4, in Kadis, the First Circuit recognized its differences with the Second Circuit.

> "4. With due respect, we suggest that the Second Circuit has already partially recognized this mistake sub silentio. In United States v. Riley, 2 Cir., 1966, 363 F.2d 955, the court concluded that even though proof of inducement puts the burden on the government to prove predisposition, a defendant should not be entitled to go to the jury on entrapment unless there is some evidence of hesitation on his part. The court described our contrary decision in Sagansky, supra, as 'logical,' but said it preferred a more 'middle of the road' position. Yet we know of no other criminal case where the government was not required to go to the jury on an issue on which it had the burden of proof. A defendant's silence cannot satisfy that burden.

> Cf. United Brotherhood of Carpenters v. United States, 1947, 330 U.S. 295, 67 S. Ct. 775,...."

In Kadis the First Circuit approved the trial court's submitting the issue of entrapment to the jury, with appropriate instructions. 373 F.2d at 375. Only evidence of inducement was offered by the defense; apparently the defense did not offer any evidence of lack of predisposition. To the First Circuit this was sufficient to warrant submitting the issue to the jury. 373 F.2d at 373. Furthermore the First Circuit held that the burden of proof as to the factor of predisposition is on the government to the satisfaction of the jury beyond a reasonable doubt. 373 F.2d at 373 (Emphasis added.) The First Circuit noted at footnote 4 (at 373) that they knew of no situation, other than the Second Circuit's handling of the entrapment issue, where the prosecution was not required to persuade the jury on an issue on which it had the burden of proof.

Also the First Circuit quarrels with the Second Circuit's splitting of the entrapment question into two separate and distinct sub-issues-inducement and predisposition. Nor does the First Circuit believe that such a division is required by Sherman (356 U.S. 369) or Sorrells (287 U.S. 435). The First Circuit wrote (373 F.2d at 373-374):

> We find, in sum, that consideration of inducement as a separate issue serves no useful purpose, and we believe it to be a mistake.[4] We will no longer bifurcate en-

> trapment into sub-issues of inducement and predisposition, but will broaden the departure initiated in Sagansky. Henceforth we will look, singly, at the ultimate question of entrapment. If the defendant shows, through government witnesses or otherwise, some indication that a government agent corrupted him, the burden of disproving entrapment will be on the government; but such a showing is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness. See United States v. Riley, supra, n. 4.
>
> While this conclusion modifies our prior decisions, we do not feel it to be at variance with the position thus far taken by the Supreme Court, which has never distinguished between the issues of inducement and predisposition, nor condemned the act of inducement apart from its effect on an innocent man.

In our case the Second Circuit treated predisposition separate and distinct from inducement, and "while it conceded sufficient evidence of inducement was supplied" by the defense, it held as a matter of fact and law that the prosecution met its burden of proof as to predisposition because the trial court (in a jury trial) found as a matter of fact that the government's evidence was "uncontradicted." (Emphasis added.)

It is indeed novel that in a criminal jury trial in which the prosecution has the burden of proof as to a contested factual issue, that the government should be relieved of its traditional obligation to persuade the jury beyond a reasonable

doubt, and should be permitted to satisfy the trial judge that its evidence is not "contradictory," but "clearly" establishes predisposition.

Such a holding does violence to the Sixth Amendment Right to a jury trial and the Fifth Amendment notions of due process. This includes concepts that the burden of proof is always on the prosecution to satisfy the jury beyond a reasonable doubt; that in a criminal jury trial all issues of fact are for the jury to resolve; and that a plea of not guilty puts in issue and contradicts all prosecution evidence and contentions. (Emphasis added.)

In effect the Second Circuit has introduced the theory of summary judgment in a criminal trial — "uncontradicted evidence" which satisfies the trial court removes the issue from the jury.

Entrapment is not an uncommon defense in trials involving "victimless" offenses — bribery, or sale of narcotics or other contraband — where undercover agents deal face to face with the defendants. It is an issue which arises with sufficient frequency in the district court. The trial courts should know with certainty whether or not it is a jury question. Nor should a defendant's right to have this issue decided by a jury depend on whether he resides in Boston or New York.

Conclusion

The petition should be granted to resolve this conflict between the circuits.

Respectfully submitted,

s/ H. Elliott Wales
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On the Petition

Kalman V. Gallop
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New York, N.Y. 10017

July 19, 1971

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 627—September Term, 1970.

(Argued February 9, 1971 Decided June 16, 1971.)

Docket No. 35591

UNITED STATES OF AMERICA,

Appellee,

—v.—

HERBERT GREENBERG,

Appellant.

Before:

FRIENDLY, *Chief Judge,*
WATERMAN, *Circuit Judge,* and MCLEAN, *District Judge.**

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Frankel, *J.*, convicting appellant, after a jury trial, of giving money to a public official, in violation of 18 U.S.C. §201 (f), for and because of official acts to be performed by the official.

Affirmed.

* Of the Southern District of New York, sitting by designation.

Appendix A

JOHN R. WING, JACK KAPLAN, Assistant United States Attorneys, WHITNEY NORTH SEYMOUR, JR., United States Attorney, *for Appellee.*

KALMAN V. GALLOP, New York City, *for Appellant.*

WATERMAN, *Circuit Judge*:

In a three-count indictment Herbert Greenberg, an agent of the Internal Revenue Service, was charged with having violated three different statutes. In the first count he was charged with bribery (18 U.S.C. §201(b)); in the second with giving $200 otherwise than as provided by law to a public official for and because of official acts to be performed by the official (18 U.S.C. §201(f)); and in the third with having failed to report a violation of the revenue laws (26 U.S.C. §7214(a)(8)). He was tried to a jury and did not take the stand in his own defense. The third count was dismissed by the trial judge at the close of the government case. The remaining two counts were submitted to the jury which acquitted on the first count and returned a guilty verdict on the second. Appellant was sentenced to a six month term of imprisonment and fined $5000; he is presently free on bail. He appeals his conviction on Count Two and the sole issues he presents upon his appeal relate to whether the trial judge acted properly in declining to submit for jury determination the question of whether appellant's criminal act was caused by a government entrapment.

This case arises out of the undercover investigation by the Inspection Service branch of the Internal Revenue Service into alleged corrupt practices by Internal Revenue Agents engaged in field audit work in the Jamaica, New

York area. In furtherance of this investigation Harold Wenig of the Inspection Service assumed the role of a corrupt and dishonest agent who was willing to sell to other Internal Revenue Agents information contained in the Inspection Service files. He met Jack Brover on March 23, 1967 to discuss the sale of information regarding a special audit of a case in which Brover had accepted a substantial bribe. During the course of the meeting Wenig asked Brover if he knew Greenberg and, when Brover answered affirmatively, Wenig indicated that Greenberg's activities were also being investigated. Brover subsequently contacted Greenberg; informed him of the investigation, and commented on Wenig's willingness to sell information. Greenberg agreed to meet Wenig and arrangements for the meeting were then made by Brover during a telephone conversation with Wenig, in the course of which Brover assured Wenig that Greenberg understood the financial arrangements that Greenberg would be expected to comply with.

On April 7, 1967 Wenig met with Brover and Greenberg in Wenig's automobile. Wenig drove them around lower Manhattan while Greenberg, seeking to insure Wenig's trustworthiness, sought to identify acquaintances and associates that he and Wenig might know in common. After a short time Wenig stopped the car, parked it conveniently near four surveilling Inspection Service agents, and asked Greenberg to leave momentarily. Wenig then spoke privately with Brover, and when Greenberg reentered the car Brover left. Then, following some preliminary sparring, Wenig told Greenberg that the Inspection Service was interested in checking up on the field audit of Arthur and Lucille DeBevoise and of various corporations owned by them because the audit seemed incomplete and because

bribes might have been accepted. Greenberg recalled the audit. He denied accepting a bribe, but admitted overlooking certain questionable claims. He expressed apprehension to Wenig, especially because he said he feared that the taxpayers' accountant had probably received funds from the taxpayers with which to make a bribe but had kept the money for himself and Greenberg thought that the accountant, if arrested, would claim that he had passed on the money. Greenberg admitted that he suspected other agents working on the case had "done something" and, as a result, he concluded he should go along rather than rock the boat.

Greenberg asked Wenig to continue to provide information and he asked for Wenig's private telephone number. Greenberg wondered whether Wenig could reach the investigating agent, but Wenig argued that this would be too risky. At this point Greenberg noted that perhaps the Mafia could reach him even if Wenig could not. Wenig thought aloud that the better course would be to await further developments, and Greenberg agreed.

Greenberg gave Wenig two $100 bills.

Four other I.R.S. inspectors observed this meeting and the conversation was recorded through devices secreted upon Wenig's person and hidden in his car.

On April 17, 1967 Wenig told Greenberg over the telephone that the DeBevoise corporations were being investigated for criminal tax fraud and that bringing in the Mafia to reach the investigating agent would not be wise. This was the only other time Wenig and Greenberg conversed. At trial the tape recording of the April 7 talks was admitted into evidence and was heard by the jury. Greenberg did not take the stand and sought to establish the defense that the Government had entrapped him into giving the

money to Wenig. The trial judge ruled that, as a matter of law, there was insufficient proof of this to warrant the submission of that issue to the jury.

Greenberg contends that this ruling was prejudicially erroneous, that the issues relevant to his entrapment defense should have been submitted to the jury and that the failure to do so requires a new trial. We do not agree and affirm the conviction.

This circuit adheres to the bifurcated analysis of entrapment defined in *United States* v. *Sherman,* 200 F.2d 880, 882-883 (2 Cir. 1952) (L. Hand).[1] In *Sherman* we sought to explain the early Supreme Court decision in *Sorrells* v. *United States,* 287 U.S. 435 (1932), and concluded that the defense of entrapment presents two separate factual issues for resolution:

> (1) [D]id the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it.

We have heretofore ruled that inducement refers to the Government's initiation of the crime apart from the degree of pressure exerted upon the defendant to commit the crime; and that the defendant's burden is "relatively slight" to substantiate an inducement. *United States* v. *Henry,* 417 F.2d 267, 269 (2 Cir. 1969), *cert. denied,* 397 U.S. 953 (1970). Here it is conceded that sufficient evidence of inducement was supplied.

---

1 This approach has been rejected by the First Circuit in *Kadis* v. *United States,* 373 F.2d 370 (1 Cir. 1967). We have not been asked to reconsider *Sherman* in the light of *Kadis.*

We now discuss the second, the predisposition, issue. In *United States* v. *Riley*, 363 F.2d 955, 959 (2 Cir. 1966), we considered the proof required of the Government to satisfy its burden on this issue so as to preclude submission of the entrapment defense to the jury, and we held that entrapment is not a jury question "if uncontradicted proof has established that the accused" had the requisite propensity. Nevertheless, "the production of any evidence negating propensity, whether in cross-examination or otherwise, requires submission to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be." [2]

As required by *Riley*, here the district court found as the basis for not submitting the entrapment issue to the jury that "the government's evidence shows uncontradicted evidence of readiness and willingness."

Greenberg argues that the requirement in *Riley* that the proof of propenisity be uncontradicted means that that proof must be both "uncontradicted" and "beyond a reasonable doubt," that the Government failed to meet this standard, and that the Government's own evidence of government inducement was sufficient to require that the jury decide whether he was entrapped. We agree with appellant that the Government must introduce more than a "scintilla" of evidence on predisposition. But here the Government went far beyond this. Its evidence showed that Greenberg grasped at the opportunity, and this was not challenged either by contradiction or by impeachment

---

2 The court in *Riley* thought that its holding reconciled those cases which affirmed convictions "on the ground that submission was not required even though the evidence showed Government initiation" with other cases "condemning a failure to put the issue to the jury although the evidence on propensity strongly favored the prosecution." 363 F.2d at 959.

of the Government witnesses. As recognized in *Riley* the defense of entrapment is primarily the implementation of a policy that crimes committed at the behest of government agents involve special considerations, but that the defense does not negative any of the essential elements of the crime. Thus, when the Government offers substantial evidence of propensity and this is in no way challenged, there is no occasion to submit the issue of entrapment to the jury.[3]

Appellant contends that, even though he did not contradict the Government's evidence, the prosecution's own case was internally inconsistent and so the Government itself failed to build a substantial enough case to withdraw entrapment issues from the jury. However, we are satisfied from a careful reading of the transcript that the Government clearly demonstrated Greenberg's predisposition, and, as Greenberg offered no contradictory evidence, we subscribe to the district court's conclusions,[4] and affirm his conviction.

Affirmed.

---

3 Of course it is to be noted that, if contradictory evidence is introduced, the question of predisposition becomes an issue for the jury with the normal burden of proof beyond a reasonable doubt.

4 We are also asked to hold that the "permissible limits" of inducement were exceeded by the agent because "the fear of unwarranted investigation" by the government exerted an undue and improper pressure upon the defendant. Cf. *United States* v. *Morrison*, 348 F.2d 1003 (2 Cir.), *cert. denied*, 382 U.S. 905 (1965). The evidence, however, discloses that Greenberg was not an innocent citizen unjustly misled.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

HERBERT GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-73

HERBERT GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of giving money to a public official for official acts to be performed, in violation of 18 U.S.C. 201. He was sentenced to six months' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App.).

The facts, which are set forth in the court of appeals opinion, show that petitioner, an Internal Revenue agent, met Wenig, an agent of the investigative branch who was posing as a corrupt agent willing to sell information, through another agent who, like petitioner, was being investigated. At a meeting in Wenig's car, petitioner was informed that the inspection service was investigating an

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audit he and others had conducted because it appeared to be incomplete and there was suspicion that bribery might be involved.

Petitioner denied accepting a bribe, but admitted he had overlooked some questionable claims. He stated further that he was apprehensive because he believed the taxpayer's accountant had been given some money to offer as bribes, and, if arrested, might claim that he had passed it on. Petitioner stated that he felt that some of the other agents working on the case had "done something" and, as a result, he concluded he should go along rather than rock the boat (Pet. App. A 4a).

Petitioner asked Wenig to continue to supply him with information and asked for Wenig's private telephone number. When Wenig rejected as too risky a suggestion that he attempt to "reach" the investigating agent, petitioner suggested that perhaps the Mafia could reach him. Wenig said that the better course would be to await further developments. Petitioner then gave Wenig two $100 bills.

The meeting in Wenig's car was secretly observed by four other IRS inspectors. The conversation was reported by devices hidden on Wenig's person and in the car. At trial, the tape recording was admitted into evidence.

Petitioner did not take the stand, but requested that the issue of entrapment be submitted to the jury. The trial judge ruled as a matter of law that there was insufficient proof of entrapment to submit the issue to the jury. The court of appeals, applying its bifurcated

approach to the issue, *United States* v. *Sherman*, 200 F. 2d 880, 882–883 (C.A. 2), ruled that, although inducement[1] had been shown, the evidence of petitioner's predisposition to commit the crime was uncontradicted. Accordingly, it declined to rule that the issue should have been submitted to the jury. *United States* v. *Henry*, 417 F. 2d 267, 270 (C.A. 2), certiorari denied, 397 U.S. 953; *United States* v. *Riley*, 363 F. 2d 955, 959 (C.A. 2).

Petitioner contends essentially that the government's production of "uncontradicted" evidence of predisposition is not sufficient to remove the issue of entrapment from the jury, which must find predisposition beyond a reasonable doubt. In this case, since the only evidence of entrapment was the initiation of the discussion by a government agent, this argument amounts to the contention that evidence of solicitation by a government agent is in itself sufficient to require that the issue be submitted to the jury. That, however, is not the rule. Where, as in this case, the issue of entrapment can be decided as a matter of law, the judge may properly decline to submit it to the jury. See *Sherman* v. *United States*, 356 U.S. 369, 377; *Lopez* v. *United States*, 373 U.S. 427, 436-437; *Osborn* v. *United States*, 385 U.S. 323, 331–332; *Berry* v. *United States*, 324 F. 2d 407 (C.A.D.C.), certiorari denied, 376 U.S. 959; *Hester* v. *United States*, 303 F. 2d 47 (C.A. 10), *certiorari denied*, 371 U.S. 847.

It is true that the First and Second Circuits differ as to the desirability of a bifurcated approach to en-

[1] Under the Second Circuit test, inducement refers merely to government initiation of the crime (Pet. App. 5a).